

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

ROBERT J. GLADWIN, Judge

CA06-117

DECEMBER 6, 2006

NICHOLAS D. RONE

APPELLANT

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CIV 2002-634-1]

HON. TOM J. KEITH,
JUDGE

V.

RONNY GENE PHIPPS, M.D.

APPELLEE

REVERSED AND REMANDED

Appellant Nicholas D. Rone appeals the decision of the Benton County Circuit Court to grant appellee Ronny Gene Phipp's, M.D. motion for directed verdict. Appellant's sole point on appeal is that the trial court erred in granting the directed verdict. We agree that the trial court erred and reverse its decision, remanding this case for further proceedings.

Appellant experienced the sudden onset of lower abdominal and scrotal pain while at work on Thursday afternoon, October 11, 2001. He left work early and returned home. He called his doctor who told him to go to the emergency room. He went to Bates Medical Center (Bates) in Bentonville and was treated by appellee. Appellee ordered a testicular ultrasound which was interpreted as showing normal blood flow in the testicular artery.

Appellee made a diagnosis of epididymitis¹, prescribed an antibiotic and pain medication, and discharged appellant to his home with instructions to follow up with his regular physician “soon.” The family was told by a nurse that “soon” meant Monday, October 15, 2001.

Appellant went to see his family physician Monday morning. His family physician sent him to Dr. Aguilar-Guzman, a urologist. Dr. Aguilar-Guzman admitted appellant to Bates. A nuclear medicine testicular scan and a scrotal sonogram both showed no blood flow to the right testicle. Dr. Aguilar-Guzman stated that the scan indicated probable testicular torsion² and subsequent infarction. He said there was no reason to perform exploratory surgery at that time because the patient’s window of opportunity to salvage the testicle was within six to eight hours from onset of pain and swelling, which had been present since Thursday. Dr. Aguilar-Guzman told appellant and appellant’s father that appellant would likely lose the testicle.

At the request of the family, appellant was discharged from Bates against medical advice. Appellant was then admitted to Northwest Medical Center in Springdale by Dr. T. Stephen Shaddox, another urologist, on October 17, 2001. On October 18, 2001, Dr. Shaddox diagnosed appellant with a testicular torsion and removed his right testicle and tethered his left testicle. The appellant was discharged from the hospital on October 20,

¹An infection in the lining or the outside area of the testicle.

²When the blood supply to the testicle is cut off due to a twist in the spermatic cord.

2001. Appellant filed suit on October 10, 2003, against appellee alleging medical malpractice. The case proceeded to trial against appellee on October 4, 2005. At the conclusion of the appellant's case-in-chief, the trial court directed a verdict in favor of appellee. This appeal followed.

A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, __ S.W.3d __ (2005). Substantial evidence is defined as that which is of sufficient force and character that it will compel a conclusion one way or another. *Id.* It must force or induce the mind to pass beyond suspicion or conjecture. *Id.* In determining whether a directed verdict should have been granted, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented. *Id.* It is not our province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support a jury verdict. *Id.*

Our medical-malpractice statutes set forth the burden of proof that must be met by a plaintiff. In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) by means of expert testimony provided only by a medical-care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed

and used by members of the profession of the medical-care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality; (2) by means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical-care provider failed to act in accordance with that standard; (3) by means of expert testimony provided only by a qualified medical expert that, as a proximate result thereof, the injured person suffered injuries that would not otherwise have occurred.

Ark. Code Ann. § 16-114-206(a) (Supp. 2003). Further, the expert's opinion must be stated within a reasonable degree of medical certainty or probability. *See Watts v. St. Edward Mercy Med. Ctr.*, 74 Ark. App. 406, 49 S.W.3d 149 (2001).

Appellant's medical expert, Dr. Eugene Saltzberg, testified as follows:

The standard of care is what a reasonably qualified physician given the geographical location would do in a given medical situation. A patient like Mr. Rone, the most important thing that needs to be done for a patient in this situation is to make sure that there is prompt follow-up of his presenting problem. When I say prompt follow-up, this is necessary to make sure that within a reasonable window of time the patient is evaluated by the appropriate specialist to make sure that if he does have a torsion of the testicle that it can be diagnosed, surgical intervention can occur, and you would save the testicle at that point.

So the standard of care in a situation where you suspect the possibility of a testicular torsion is not ruled out by a normal blood flow study to the testicle. There is still the possibility that there is some blood flow and that you're in the process of torsion, and, so, the actual torsion of the testicle is not ruled out.

In a death type of a situation, it's important that the patient be seen by an appropriate specialist usually within 12 hours of the emergency room visit. Some people say six hours, some people say 12 hours, some textbooks even say up to 24 hours until the testicle is absolutely going to be dead. But the way for an emergency room doctor to deal with this situation would be one of two areas, one of two ways.

The first way would be to admit the patient to the hospital in consultation with the patient's primary doctor and a urologist and assure that the patient is going to be seen by the appropriate specialist within a reasonable period of time. Given that it's a

week night, the other option would be to treat the patient with pain medication, send the patient home with the instructions and actually with the, uh, actually having spoken to and organized a visit to the patient's primary doctor or a urologist early the next morning.

. . . [M]y opinion is that Dr. Phipps fell below the standard of care for a reasonably qualified doctor in a community hospital like this at that time. The reason I would say that is because Dr. Phipps gave Mr. Rone instructions to follow-up with his doctor soon. There was no direct contact with his primary doctor or with the urologist, and the vagueness of that – those follow-up instructions enabled the patient to believe that he got appropriate care and that within a reasonable period of time his problem would resolve. And without this necessary prompt follow-up of instruction – and actually the standard of care would be to call the doctor and arrange this follow-up – the patient was able to go on and believe that his problem would resolve. And, unfortunately, he lost his testicle because of that. (Emphasis added.)

Appellant argues that Dr. Saltzberg's testimony taken as a whole, and drawing all reasonable inferences in favor of appellant, clearly shows that there was sufficient evidence from which the jury could find that appellee violated the standard of care and that his violation of the standard of care proximately caused appellant to lose his testicle. We agree.

Proximate causation is a question of fact for the jury. Appellant cites *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004), where this court said:

Arkansas does not require any specific "magic words" with respect to expert opinions, and they are to be judged upon the entirety of the opinion, not validated or invalidated on the presence or lack of "magic words." See *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Even in medical malpractice cases, proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be fairly inferred. See *Stecker v. First Commercial Trust Co.*, 331 Ark. 452, 962 S.W.2d 792 (1998).

Id. at 239, 148 S.W.3d at 759. Therefore, appellant argues, under Arkansas law, Dr. Saltzberg's testimony was sufficient.

Appellant claims that the medical records admitted into evidence bolster Dr. Saltzberg's testimony. For example, when appellant was discharged from the hospital after his surgery, the discharge diagnosis was "torsion, right testicle." Dr. Shaddox wrote in his discharge summary that appellant "had 4+ scrotal edema and erythema from torsion of six to seven days old." A torsion of six to seven days old would have put it occurring on October 11 or 12. Dr. Aguilar-Guzman stated in his progress notes dated October 15, 2001, that there was no reason to explore the testicle surgically at that time because the window of opportunity to salvage it was within six to eight hours from the onset of pain and swelling. He stated, "[o]f course this has been present since Thursday." Therefore, there is no doubt that appellant had a testicular torsion.

Finally, appellant cites *Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970), in support of his contention that there was sufficient evidence of proximate cause for the jury. In *Jeanes*, the United States Court of Appeals for the Eighth Circuit found, based upon Arkansas law, that the lower court erred in taking the question of proximate cause from the jury in a medical malpractice case where a thirteen-year-old boy died from cancer of the throat after a one-month delay in sending slides from a biopsy of the mass in the boy's throat to an out-of-state laboratory. The Eighth Circuit said:

We cannot agree with the District Court's holding that "there is no evidence from which the jury could find that the delay of approximately one month in the transmission of [the] slides could have been the proximate cause of [Tommy's] failure to recover from his cancer, or to increase his pain and suffering or to shorten his life." Nor can we agree that the jury could "only find a verdict for the plaintiff based on speculation and conjecture."

Id. at 604.

Appellee claims that the trial court acted appropriately when it granted the directed verdict in his favor. He emphasizes by citing *Young v. Gastro-Intestinal Ctr. Inc.*, 361 Ark. 209, ___ S.W.3d ___ (2005), that in order for a plaintiff to satisfy his burden of proof, the requisite expert testimony must be stated to a reasonable degree of medical certainty or probability. He concludes that, where expert testimony is speculative, it cannot be used to satisfy a plaintiff's burden of proof.

First, appellee claims that appellant's expert testified that his criticisms of appellee were contingent upon the situation being one where "the possibility of a testicular torsion is not ruled out by a normal blood flow study to the testicle." Appellee claims that Dr. Saltzberg stated that only if a normal blood flow was not established, then it would be important for the patient to be seen by a specialist within twelve hours. Appellee emphasizes that here, appellant had normal blood flow as shown by the emergency room ultrasound tests, therefore, the remainder of Dr. Saltzberg's recommendations do not apply.

However, appellee misinterprets the expert's testimony. In Dr. Saltzberg's testimony as set forth above, we provide emphasis to the pertinent testimony that is misinterpreted by appellee. Appellee argues that Dr. Saltzberg is testifying that the normal blood flow test performed on appellant in the emergency room ruled out any further treatment for torsion. We do not agree. The expert's testimony could be interpreted to mean that if a doctor

suspects there is a torsion, even if the tests still show blood flow, more steps must be taken in order to insure that a torsion is not in the process of happening.

Second, appellee argues that appellant failed to offer the requisite expert testimony pursuant to Ark. Code Ann. § 16-114-206, which cannot be speculative and must be stated to a reasonable degree of medical certainty. Appellee refers to Dr. Saltzberg's testimony that it would be speculation to say exactly when the testicle became torsed. He also refers to Dr. Saltzberg's testimony regarding the two ways in which an emergency room doctor should have handled the situation. Again, appellee claims that because there was normal blood flow at the emergency room visit, those two ways were not applicable in this case; thus, appellant's expert did not testify about the standard of care applicable here. And again, appellee misconstrues the expert's testimony.

Third, appellee claims that appellant failed to make a case on the essential element of proximate causation. He says that appellant contends that appellee should have arranged a follow-up examination the morning following his emergency room visit. Appellee points out that Dr. Saltzberg's testimony indicates that it would be speculation to say whether doing so would have prevented any injury. Appellee cites testimony by Dr. Saltzberg stating that it would have been speculation to say what Dr. Aguilar-Guzman's impression would have been if he had seen appellant on October 12 instead of October 15. However, as stated earlier, proximate cause is a jury question, and may be proved circumstantially. As appellant points out in *Jeanes, supra*, the Eighth Circuit cited *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d

818 (1944), which said that “it is not required in a case of this kind that the injured party show to a mathematical certainty or to the exclusion of every other hypothesis that his injury occurred as a result of the negligence of which he complains.”

Reversed and remanded.

PITTMAN, C.J., and ROBBINS, J., agree.